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IN THE

Supreme Court of the United States

October Term, 1957.
No. 726.

M. ALEXANDER FORMAN and BETTY FORMAN, his wife, *Appellants*

v.

Irwin Apfel, Liquidating Receiver of Self Drive It Corporation and Richard S. Robinson, Petitioning Shareholder

APPELLEES ALTERNATIVE MOTION UNDER RULE 16 TO DISMISS OR AFFIRM.

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AND NOW, on this 7 day of ~~January~~ February, 1958, by their attorneys, A. D. Caesar, Esquire, and Nathan I. Miller, Esq., comes appellee, Irwin Apfel, duly appointed and qualified Liquidating Receiver of Self Drive It Corp., and appellees Richard S. Robinson and Florence H. Robinson, who moves the court to dismiss or affirm the appeal in the above entitled case.

1. Self Drive It Corp. is a Pennsylvania corporation, with officers, directors and shareholders as follows:

a) Officers: President—Richard S. Robinson
Secretary-Treasurer—M. Alexander Forman

b) Directors: Richard S. Robinson (appellee)
Florence H. Robinson (his wife) (appellee)
M. Alexander Forman (appellant)

c) Shareholders and Percentage of Ownership:

Richard S. Robinson	49 percent
Florence H. Robinson	1 percent
Total	50 percent
M. Alexander Forman	49 percent
Betty Forman	1 percent
Total	50 percent

2. On October 24, 1956, Richard S. Robinson, appellee, petitioned the Common Pleas Court of Philadelphia County under Section 1107(A)(4) of the Pennsylvania Business Corporation Law of 1933 as amended for the appointment of a liquidating receiver to liquidate the assets and wind up the business of Self Drive It Corp. because its directors were deadlocked in the management of the corporate affairs, the shareholders were unable to break the deadlock, irreparable damage and injury was being suffered by the said corporation, and such damage and injury would continue and be of such character and nature as to destroy the equity of the shareholders and be injurious to the creditors.

3. Thereafter, on the same day and pursuant to Section 1108(A) of said Law, and upon consideration of the said petition, Irwin Apfel, Esquire and David Cohen, Esquire were duly appointed (and thereafter duly qualified by filing of bond) as temporary (pendente lite) co-receivers of Self Drive It Corp. until a hearing be held for the purpose of determining whether a permanent receiver to liquidate

the assets should be appointed. The temporary co-receivers were further ordered to file an inventory and appraisement of the assets and property and within thirty days to make a full report to the Court.

4. On November 15, 1956, the temporary co-receivers filed a full and complete Report and Inventory and Appraisement (with copious Exhibits attached) in which they recommended and gave their detailed reasons therefor that a liquidating receiver be appointed with full powers and authority, and that he be authorized to liquidate the assets of the subject corporation.

5. That on the same date November 15, 1956 the court, upon consideration of the report and inventory and appraisement of the temporary co-receivers, ordered that a hearing be held at 3:00 o'clock, P.M. on November 21, 1956 for the purpose of determining whether or not a liquidating receiver should be appointed.

6. At the time and place so scheduled, David N. Bressler, Esquire and Phillip B. Robinson, Esquire duly entered their appearances on behalf of Richard S. Robinson and Florence H. Robinson, appellees, and J. Webster Jones, Esquire entered his appearance of record on behalf of M. Alexander Forman and Betty Forman, appellants. Appellants' counsel on appellants' behalf thereupon cross-examined the witnesses who testified for petitioner, and, finally, appellants' counsel requested on appellants' behalf that the hearing be continued for one week in order to prepare and review appellants' case. The court, over objection, granted the request, and the hearing was accordingly continued to November 28, 1956.

7. On November 28, 1956, when the continued hearing was resumed, appellants' counsel announced in open court and in the presence of M. Alexander Forman, appellant,

that he agreed and stipulated to the appointment of a liquidating receiver (35a), and, pursuant to and in reliance upon such agreement and stipulation, Irwin Apfel, Esquire was then and there appointed by the Court under Section 1108(B) of said Law as liquidating receiver to liquidate all of the assets and affairs of Self Drive It Corp. Said liquidating receiver has duly qualified by the filing of bond.

The record before the lower court states precisely the use of the correct term as used in the act herein referred to as "Liquidating Receiver". That appellants did not object to and in fact said nothing at all which would have the effect of qualifying the consent to the appointment of the liquidating receiver. The record further disclosed that the court makes reference to the services and the acts to be performed by the liquidating receiver that the court appointed and throughout said discourse by the court appellants neither objected nor gave any objection whatsoever that they intended to qualify their consent to the appointment of a receiver.

8. On December 4, 1956, the liquidating receiver filed a petition for leave to sell in bulk the assets of Self Drive It Corp., and upon consideration of such petition, the court ordered and decreed on December 5, 1956, that the liquidating receiver sell all of the assets in bulk of Self Drive It Corp. in open court and to the highest bidder, the sale to be held at 3:00 o'clock p.m. on December 19, 1956. The order and decree also contained full, complete and detailed terms and conditions under which the sale was to be conducted.

9. At approximately 2:35 o'clock p.m. on December 19, 1956, J. Webster Jones, Esquire, on behalf of M. Alexander Forman and Betty Forman, his wife, lodged a notice of appeal with the Prothonotary of the Supreme Court of Pennsylvania (54a). Said notice of appeal merely stated that an appeal was to be entered from "The Order and Judgment of Common Pleas Court No. 1 of the County of

Philadelphia," and was made returnable the third Monday in April, 1957, to wit, April 15, 1957. Said notice of appeal improperly and erroneously described the proceedings as being a "Receivership in Equity."

10. Thereafter, on the same day, to wit, December 19, 1956, at 3:00 o'clock p. m. at the scheduled time and place for the scheduled sale, appellants' counsel requested the court to continue the sale for nine days so that he could "submit other bids that are in the offing but which I am not in a position to submit today" (54a). The Court, over objection, granted the request, and continued the sale until 12:00 noon on December 28, 1956.

11. At 12:00 noon on December 28, 1956, when the continued sale was resumed, appellants' counsel once again requested the Court to continue the sale, this time until January 8, 1957, so that he could have additional time in which to discuss with the "gentleman who would have the final say" and "who, as we represented to the Court is interest in making a bid" and, further stated appellants' counsel, "I expect to obtain what I believe should be a substantial offer from that particular source." (N.T.—12/28/56 —p. 37.) The Court again over objection granted this, appellants' fourth, continuance.

12. On January 8, 1957, at 10:00 o'clock a.m., when the sale (twice continued at the request of appellants' counsel) was resumed, the liquidating receiver sold all of the assets of Self Drive It Corp. in open court and under judicial supervision to one Allen Weinberg, the highest bidder thereat, who bid $673,000 (subject to adjustments at the closing date). Appellants' counsel, on behalf of appellants, M. Alexander Forman (who was present) and Betty Forman, there and then participated in the bidding, and bidded on behalf of appellants the next to the highest bid, to wit, $672,000. Said bidding was progressive from an opening bid of $585,000.

13. Under the terms and conditions of the sale, the amount of the final successful bid was subject to certain adjustments, which amounted to an additional sum of $123,580.56. Thus, the assets were sold for a total price of $796,580.56, which is an amount sufficiently large so that after all creditors and administration expenses of corporation are satisfied in full, a substantial equity will remain for division among the shareholders.

14. Said sale of the assets to Allen Weinberg was confirmed by orders of the Court dated January 8, 1957 and January 11, 1957.

15. All of the assets (including realty) of said corporation have been liquidated, and title to all assets has been duly conveyed, transferred and assigned by the liquidating receiver.

16. The total purchase price of $796,580.56 has been paid in full to the liquidating receiver, from which fund the liquidating receiver has discharged by payments with Court approval first obtained by petitions and orders and under Court supervision all obligations incurred by the temporary co-receivers and the liquidating receiver (amounting to approximately $104,623.26), and the claims of all secured creditors (amounting to approximately $429,239.71), and taxes (amounting to approximately $11,198.25).

17. The first and final account of the temporary co-receivers, and the first account, operating and liquidating, of the liquidating receiver, has been filed and said accounts have been audited and confirmed on December 16, 1957.

18. The appeal of M. Alexander Forman and Betty Forman his wife should be dismissed for the following reasons:

(a) Appellants having once given express consent in open court to the appointment of the liquidating receiver

at a hearing held for the express purpose of affording due process, they thereby consented to the appointment of the liquidating receiver and thus impliedly, if not expressly, admitted the necessity for such an appointment. Appellants, by their consent and acquiescence to the appointment of the liquidating receiver, induced the court below to take the action of which they now complain and appellants should, therefore, be foreclosed from complaining about the order of the court.

(b) The Court of Common Pleas did on December 5, 1956, order the sale of the assets of Self Drive It Corp. That thereafter on December 19, 1956, after appellants had consented to the court's action in ordering the sale, did lodge a notice of appeal with the Prothonotary of Supreme Court of Pennsylvania and consequently had no basis for appeal.

(c) The record discloses that on November 15, 1956 the Common Pleas Court fixed a hearing on the merits of the stockholders petition to be held on November 21, 1956 at a fixed time and place and requiring notice of said hearing to be served upon all parties in interest. Affidavit of service of notice was filed. At the time and place so scheduled appellants appeared with counsel and participated in the proceedings. They obtained a continuance in order to present their testimony, said hearing was therefor continued until November 28, 1956. At the continued hearing appellants attended with their counsel and expressly agreed to the appointment of the Liquidating Receiver. Appellants participated actively in all proceedings had thereafter including their active participation in the bidding at the sale held pursuant to Petition and Order of the Common Pleas Court.

(d) The order of the Court of Common Pleas No. 1 of October 24, 1956, appointing the temporary receivers provides in Paragraph 1 Sub Section 7 thereof *"that the court shall pursuant to order, fix a date for hearing upon this petition, * * *"*.

This is distinguished from the case of *Nottebaum et al v. Leckie et al* (Noxom Chemical Products Co. Inc.), 31 F. 2nd 556, for in said cited case the Lower Court appointed permanent receivers and granted an absolute injunction in ex parte proceedings, without opportunity to the defending parties to be heard or without provision for a hearing to be held.

The Court of Appeals held that this was a final decree in which the suit between the parties was at an end. That the Lower Court so acting without affording the defendants an opportunity to be heard was a taking of its property without due process of law.

In the instant case the Lower Court ex parte appointed Temporary Receivers until a hearing be held. This was not a final decree. That on a date fixed by the Lower Court hearings were held. (Same are fully referred to in this brief.)

(e) Appellants in their jurisdictional statement pages 6, 8, 9, 14, rest their argument for certiorari primarily on the words "and move on from that point," stated by co unsel for appellants at the hearing of November 28, 1956 (the second hearing held on the merits of the stockholders petition). These words convey most particularly a colloquial expression, meaning let us take up the next matter, and the record reflects that the next matters were the appointment of the Liquidating Receiver, the submission of the order of appointment of said Liquidating Receiver, the examination of same by the Court and all counsel and the signing of said order by the Court. These words mean exactly what they state "move on from that point" and do not in any aspect reflect a reservation or waiver.

They are clear and unambiguous words and cannot be interpreted to record a reservation or waiver. The record is clear and concise and nowhere therein did the appellants object, or reserve the right to object to the appointment of the Liquidating Receiver, on the contrary the record discloses an expressed consent to such appointment.

(f) Appellants in question presented (Jurisdictional statement page 3-14), assumes that the action of the Court of Common Pleas in appo nting the Temporary Receivers was void. The record discloses that the appointment of Temporary Receivers was made pursuant to the provisions of the Business Corporation Law of Pennsylvania. (Act of May 5, 1933 P. S. 364 15 P. S. 2852 Sections 1107-1108.) Appellants by motion to quash, set aside and dismiss urged the Court of Common Pleas to dismiss the proceedings as being unconstitutional. Said motion was filed on December 7, 1956, same was dismissed by the Common Pleas Court after hearing thereon. The appeal filed by Appellants on December 9, 1956, to the Supreme Court of Pennsylvania did not raise the question of constitutionality of the Business Corp. Law of Pennsylvania, or particularly Sections 1107-1108 thereof (see statement of questions involved—Brief of Appellants—Appeal to Supreme Court of Pa.).

Appellants contend that their petition to quash, set aside and dismiss was made "at the earliest possible moment" (page 9 paragraph 4 of appellants' Brief). *This is not so.* Appellants allege the unconstitutional act to be the appointment of the temporary receivers on October 24th, 1956. Notice of this appointment was immediately sent to appellant. A hearing on the original petition of October 24th, 1956 was held on November 21st, 1956 where appellant appeared and cross examined appellees and appellees' witnesses. At the close of the hearing of November 21st, 1956, appellant asked for and was granted a continuance in order to prepare his case concerning whether or not a deadlock in management of the corporation, etc. occurred. There was no motion to quash, set aside or dismiss or any other form of objection to the proceedings filed or made by appellant. Nor did appellant file or make any objection whatsoever at the continued hearing held on November 29th, 1956 where, to the contrary, appellant agreed to the appointment of a liquidating receiver. The first act appellant took objecting to the proceedings was on December 7, 1956.

That a Temporary Receiver may be appointed in advance of a hearing where irreparable injury would be sustained has been upheld in the Courts of the Commonwealth of Pennsylvania and in the Federal jurisdiction, both at common law and by case law. *Gowan, et al. vs. Jeffries*, 2 Ash. 296 (1840); *Kolb Coal Co. vs, Sauter*, 295 F. 690 (1924); *Shoemaker, et al. vs. Menell Mortuaries, Inc., et al.*, 2 Fed. Sup. 672 (1933); *Tennessee Pub. Co. vs. Carpenter*, 100 Fed. 2nd 728 (1938).

In the instant case, the appellees are proceeding under a statute wherein the legislature has propounded and enumerated the specified instances in which "actual emergency and irreparable harm and damage exist." In so doing they are merely crystallizing the common law doctrine pertaining to the appointment of temporary receivers.

It is well settled that ex parte appointments of temporary receivers is a constitutional fact. Rule 1533 of the Pennsylvania Rules of Civil Procedure recognizes this and states (inter alia) "(a) a temporary receiver may be appointed without notice if required by the exigencies of the case * * *."

To recapitulate.

1. The original appointment was of temporary receivers with notice of an opportunity to be heard.

2. The order of October 24, 1956 appointing the temporary receivers until hearing held, was not a final decree, but an interlocutory decree.

3. The record discloses that at the hearing held on November 21, 1956, appellants actively participated and that at the hearing of November 28, 1956, appellants participated and specifically consented. Appellants can not now say that they had no opportunity to be heard or present their claims or defense.

4. The record discloses that appellants gave their express consent in open court to the appointment of the liquidating receiver at the hearing held for the express purpose of affording due process.

5. That the constitutionality of the Business Corp. Law of Pennsylvania particularly Sections 1107-1108, Act of May 5, 1933 P. S. 364 15 P. S. 2852 is not in issue.

WHEREFORE, IRWIN APFEL, Liquidating Receiver of Self Drive It Corp., and Richard S. Robinson and Florence H. Robinson, move the court by their counsel, to dismiss or affirm the appeal of M. Alexander Forman and Betty Forman, his wife, for any and all of the foregoing reasons.

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